IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. R.W.,[1] Appellant.	No. 33995-1-II UNPUBLISHED OPINION

Houghton, J. – After an adjudicatory hearing, the Cowlitz County Superior Court Juvenile Division found R.W. guilty of second degree assault. He appeals.

R.W. contends the trial court should have found him not guilty because he merely defended himself from J.S., the victim. R.W. further contends his lawyer ineffectively assisted him by failing to investigate or develop R.W.'s self-defense claim.

This case raises two issues. Was there sufficient evidence to allow the trial court to find, beyond a reasonable doubt, R.W. did not act in self-defense? Has he proved the trial court would probably have acquitted him if his lawyer had asked R.W. additional questions and called additional witnesses? Answering the first question "yes" and the second question "no," we affirm

[1] The nature of this case requires some confidentiality. Accordingly, under RAP 3.4, we do not use the name of this party and other juveniles involved.

the finding of guilt.

Facts[2]

In the early morning hours of July 7, 2005, R.W. and J.S. had a confrontational phone conversation; each testified that the other threatened violence. R.W. testified that he told J.S. to "bring it on" even though (1) J.S. threatened to kill him and (2) a friend told him J.S. would be armed with a gun. Report of Proceedings (RP) at 132. R.W. believed he needed to defeat J.S. in order to "stand up for" himself and to prevent future fights. RP at 139. J.S. wanted to resolve their dispute peacefully.

J.S. and some friends walked to an area by Wallace School. J.S. routinely carried a knife. A friend carried two knives, and another friend carried a gun. All kept their weapons in their pockets. R.W. apparently did not know about the friends' weapons.

R.W. waited on a friend's porch for 20 to 30 minutes. When he saw J.S. and his friends, he picked up a thick chain and ran some distance to confront and fight J.S. He dropped the chain when he saw no weapons. When prompted by his lawyer, R.W. agreed that he was frightened and nervous, but then volunteered his dominant state of mind was "angry." RP at 135.

R.W. punched J.S. in the neck "as hard as [R.W.] could" and "slammed [J.S.] to the ground." RP 135-36. J.S. tried but failed to choke R.W. R.W. punched J.S.'s face and head repeatedly. J.S. did not or could not hit back and lost consciousness. R.W. kicked or stomped J.S.'s head several times, at least once after J.S. blacked out. J.S. suffered multiple injuries, including a "blow-out" fracture of his eye socket. RP at 105. J.S.'s injuries required surgery.

[2] The trial court found J.S. more credible and, when disputed, adopted his version of events. On appeal, R.W. does not challenge the trial court's credibility finding and that finding of fact binds us. *See State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

The State charged R.W. with second degree assault. After an adjudicatory hearing, the trial court found R.W. guilty of that crime.

ANALYSIS

Self-Defense

An individual may legally use force to prevent imminent injury so long as the force is "not more than is necessary." RCW 9A.16.020(3). The use of force is legal if one reasonably believes injury is imminent, actual danger not being necessary. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). But one who begins the fight cannot legally use force to defend against the victim's lawful use of responsive force. *Riley*, 137 Wn.2d at 909-10, 911. If there is "some evidence" of self-defense, "the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt." *State v. McCullum*, 98 Wn.2d 484, 488, 493-94, 656 P.2d 1064 (1983); *accord State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984) (requiring State to disprove self-defense in second degree assault case).

Because the absence of self-defense becomes an element, the fact finder may only convict on sufficient evidence of that element. Evidence is sufficient when a rational fact finder, viewing the evidence in the light most favorable to the State, could find the State had proved the element beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). When a defendant claims insufficient evidence, we "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

At R.W.'s trial, the court found the facts and adjudicated guilt. R.W. argues the State did not prove the absence of self-defense because R.W. testified that J.S. began the fight. But J.S.

testified that R.W. struck first, and the trial court believed J.S. We will not re-weigh the trial court's decision that J.S. testified truthfully. *See Thomas*, 150 Wn.2d at 874-75.

Viewed in the light most favorable to the State, the evidence reveals that R.W. armed himself, ran to confront and fight J.S., struck the first blow, punched J.S.'s head multiple times, kicked and stomped J.S.'s head while he lay on the ground, and kicked J.S.'s head after J.S. lost consciousness. Based on this evidence, a rational fact finder could find beyond a reasonable doubt that R.W. did not act in self-defense because he either began the fight or used more force than necessary. The trial court had sufficient evidence to find that R.W. did not act in self-defense.

Ineffective Assistance

A criminal defendant is constitutionally entitled to effective legal representation. *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Those who claim their lawyers ineffectively assisted them must prove their lawyers performed deficiently and prejudiced their defense. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). We must strongly presume that the lawyer provided effective representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

On direct appeal, R.W. must prove ineffective assistance using the contents of the trial record; we will not consider matters outside the record. *McFarland*, 127 Wn.2d at 335. To prove prejudice, R.W. must prove the result of the trial probably would have differed if the lawyer had not performed deficiently. *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). If he fails to prove prejudice, we need not decide if the lawyer performed deficiently. *Lord*, 117 Wn.2d at 884.

Here, R.W. argues his defense counsel did not effectively assist him in presenting his self-defense theory. Specifically, R.W. claims his counsel should have asked him more questions about his subjective state of mind and called the other people present at the fight as witnesses. R.W. suggests more questions could have proved he feared J.S. and justified R.W.'s violent actions. R.W. also suggests that spectators at the fight would have supported his version of events.

R.W. hypothesizes rather than proves prejudice. The trial record does not show additional questions would have justified his actions. To the contrary, he testified he was angry and he did not know why he kicked J.S.'s head. At least on the trial record, R.W.'s counsel did not hurt R.W.'s chances by choosing not to follow up these startling revelations. And nothing in the trial record proves the other people present would have supported R.W.'s version. To the contrary, the spectators apparently aligned with J.S., not R.W. R.W. fails to prove the trial court probably would have acquitted him if his counsel had asked additional questions or called additional witnesses. And because R.W. does not prove prejudice, we need not evaluate his counsel's performance.

The trial court heard sufficient evidence to find beyond a reasonable doubt that R.W. did not act in self-defense. He fails to prove the trial court probably would have acquitted him if his defense counsel had asked R.W. more questions and called additional witnesses.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, J.

We concur:

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Quinn-Brintnall, C.J.

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Van Deren, J.